IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 397 of 2003

Judgment reserved on 5.3.2007

Date of decision : 7.3.2007

Pune Ram **…Appellant.**

Versus

State of H.P. **…Respondent.**

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.
The Hon'ble Mr. Justice : Dev Darshan Sud, Judge.

Whether approved for reporting?

For the appellant: **M/s Anup Chitkara & Bhupinder Ahuja, Advocates.**

For the respondent : **Mr. Som Dutt Vasudeva, Addl. A.G. with Mr. D.S. Nainta, Dy. A.G.**

Surjit Singh, Judge

Appellant is aggrieved by the judgment dated 28.6.2003 of the learned Sessions Judge, whereby he has been convicted of offence, under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, for

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Whether reporters of Local Papers may be allowed to see the Judgment?

allegedly being in possession of eleven kilograms of 'Charas' on 5.4.2003 at a place in the forest area of village Shilaru, Tehsil Ani, District Kullu, and sentenced to undergo rigorous imprisonment for ten years and to pay fine of rupees one lac and in default of payment of fine, to undergo rigorous imprisonment for a further period of two years.

2. We have heard the learned counsel for the appellant and the learned Additional Advocate General and have also gone through the evidence with the assistance of the learned counsel for the appellant.

3. Learned counsel for the appellant stated that there were contradictions in the evidence of the witnesses of the alleged search and seizure, which made the prosecution version about the appellant having been caught with the contraband stuff in the forest of Shilaru village, highly doubtful and that the contradictions are a pointer to the fact that the convict was called to the Police Station and a false case was foisted on him. He drew our attention to the statements of PW-1 Constable Nihal Chand, PW-2 Constable Diwan Chand and PW-6 HC Rattan Chand.

4. Prosecution version is that police party headed by HC Rattan Chand (PW-6) of which PW-1 Constable Nihal Chand and PW-2 Constable Diwan Chand and one Constable Sher Singh were the members, left the Police Station Ani for routine patrolling and around 3.00 p.m., when they were passing through Shilaru forest along a forest path, the appellant came from the opposite direction with a gunny bag on his back and on seeing the police when he tried to run away, he was over-powered and the bag was searched and it was found to contain a polythene bag in which there was 'Charas' in the shape of fingers, which on being weighed was found to be eleven kilograms. PW-1 Constable Nihal Chand, PW-2

Constable Diwan Chand and PW-6 HC Rattan Chand have testified this fact in no uncertain terms.

5. The contradictions, which according to the learned defence counsel make the apprehension of the appellant and the search and seizure in the forest doubtful, are about the preparation of the search and seizure memo, the report on the basis of which the case was formally registered and the sending of such report from the spot through Constable Sher Singh. As per the testimony of PW-6 HC Rattan Chand, search and seizure memo was prepared on the spot and a report of the search and seizure of the stuff from the appellant was prepared and sent from the spot to the Police Station for the formal registration of the case through Constable Sher Singh. PW-1 Constable Nihal Chand in his cross-examination stated that no police man went to the Police Station from the spot nor did any police official reach the spot from the Police Station after the appellant was apprehended and 'Charas' was recovered from him.

6. PW-2 Diwan Chand in reply to a suggestion by the defence stated that memos. Exts. PW-1/A, PW-1/B, PW-1/C and PW-1/D were prepared at the Police Station. Ext. PW-1/A is not a memo but a piece of cloth with specimen impression of the seal, with which the samples and the bulk 'Charas' were sealed, affixed thereon. Ext. PW-1/B is the search and seizure memo, Ext. PW-1/C is the information given to the police in writing about arrest of the appellant and Ext. PW-1/D is the memo regarding personal search of the appellant conducted at the time of his formal arrest.

7. Learned counsel for the appellant argued that the fact that aforesaid papers were prepared at the Police Station, suggests that the appellant was not arrested with the 'Charas' in the forest as alleged by the

police, but he was called to the Police Station and the case was foisted upon him. We are unable to accept this submission for various reasons; first and the foremost being that such a plea has not been taken by the appellant during the course of the trial. Further, no suggestion was put on the lines of this defence to PW-1 Nihal Chand, PW-2 Diwan Chand and PW-6 HC Rattan Chand. In any case, even if it be assumed that the papers were not prepared on the spot and the same were prepared at the Police Station, that would not by itself lead to an inference that the appellant was not apprehended with the 'Charas' in the forest.

8. It was also urged by the learned counsel for the appellant that Constable Sher Singh, who allegedly carried the report from the spot to the Police Station for the formal registration of the case, has not been examined and that the statement of PW-1 Constable Nihal Chand that no police official left the spot nor did any official from the Police Station reach the spot after the appellant was intercepted, clearly indicated that no report was sent to the Police Station for the registration of the case from the spot. May be that Constable Sher Singh was not sent to the Police Station with the report for registration of the case ahead of the other police officials, who took the appellant and the case property to the Police Station, but that would not in any way affect the search and the seizure nor would that lead to an inference that the appellant was not arrested on the spot.

9. The quantity of 'Charas' recovered from the appellant is huge (eleven kilograms). Such a quantity rules out the possibility of planting the stuff upon the appellant.

10. It was also urged by the learned counsel for the appellant that it appeared that the case property, which had been produced in the Court,

was not the same or that in any case the case property had been tampered with. According to him, the polythene bag in which the 'Charas' was there, was transparent as per statement of PW-2 Constable Diwan Chand, but the polythene bag which was produced in the Court with 'Charas' therein, was not transparent as admitted by PW-2 Diwan Chand himself.

11. It is true that the witness stated to the police in his statement, under Section 161 of the Code of Criminal Procedure, that the polythene bag was transparent and the 'Charas' was visible in it and in the Court he stated that the polythene bag was not transparent, but PW-6 HC Rattan Chand, who effected the search and seizure, categorically stated that the bag was though not completely transparent, it was slightly so and this he stated as per suggestion put to him by the defence counsel. That means the bag was translucent. In any case PW-2 Constable Diwan Chand stated in no uncertain terms that the bag was the same in which the appellant was carrying the 'Charas' and this part of his statement was not specifically challenged. Hence the contention is rejected.

12. Another submission made by the learned counsel for the appellant was that the evidence led by the prosecution with respect to the deposit of the case property was doubtful and self-contradictory, creating a serious doubt whether the report of the C.T.L. pertains to the sample taken from the stuff allegedly recovered from the appellant. He drew our attention to the statements of HC Jhabe Ram (Pw-4) and HC Hem Raj (PW-3) to bring his point home.

13. PW-4 Jhabe Ram proved an entry in the register of Malkhana, copy Ext. PW-4/B, against which the case property and the two samples were deposited in the Malkhana. This witness also proved the copy of the

road certificate Ext. PW-4/C against which one of the two samples was sent to the laboratory. As per entry Ext. PW-4/B, the case property was deposited in the Malkhana by ASI SHO Pawan Kumar on 15.11.2002. It may be stated that Rattan Chand had sealed the parcels with a seal that produced the impression of letter 'A' of English alphabet and SHO Pawan Kumar (PW) re-sealed those parcels with his own seal 'H'. Entry Ext. PW-4/B records that the three parcels were sealed with seals 'A' and 'H'. There is a note against the entry that one parcel was sent to the Chemical Examiner against RC No. 105 of 2002 on 18.11.2002. Copy of the RC is Ext. PW-4/C. As per contents of this road certificate, one parcel bearing seal impressions 'A' and 'H' was sent to the Chemical Laboratory through constable Nihal Chand. There is acknowledgement of the sample recorded by the concerned official of the Laboratory on the reverse of this road certificate. The report of the Chemical Examiner Ext. PW-7/A bears certificate that the sample was received on 18.11.2002 through constable Nihal Chand.

14. PW-4 in his cross-examination stated that date of receipt of the contraband was not mentioned against the entry at serial No. 51 of 2003 in the Malkhana register. Learned counsel argued that there were two entries pertaining to the case property in the Malkhana register, one at serial No. 96 copy Ext. PW-4/B and another at serial No. 51. It is true that the witness stated that the date of deposit of the contraband against entry No. 51 of 2003 had not been mentioned, but he nowhere stated that this entry pertained to the contraband, which is subject matter of the present case.

15. Learned counsel for the appellant then drew attention of the Court to a sentence appearing in the cross-examination of PW-3 HC Hem Raj, who stated that he did not bring the Malkhana register in the Court, because the contraband was not entered in such register. It appears that this sentence has not been recorded correctly, because it does not reconcile with the rest of the testimony of the witness. The witness stated that he had sent a sample through constable Nihal Chand to the Chemical Laboratory on 18.11.2002. Entry in the Malkhana register is there and copy thereof is Ext. PW-4/B, as already noticed hereinabove. There is a note against this entry regarding dispatch of one of the two samples to the Chemical Laboratory against RC No. 105 of 2002, copy Ext. PW-4/C, which fact is testified by PW-3 Hem Raj.

16. The above discussion clearly shows that the case property was deposited in the Malkhana on 15.11.2002 against entry Ext. PW-4/B and one of the two samples deposited against the aforesaid entry was sent to the Chemical Laboratory against RC copy Ext. PW-4/Cthrough constable Nihal Chand (PW-1). The report of the Chemical Examiner Ext. PW-7/A also records that the sample was received on 18.11.2002 through constable Nihal Chand. There is no ambiguity in the evidence linking report Ext. PW-7/A with the case property.

17. It was then urged by the learned counsel for the appellant that the appellant is a poor man and unable to pay the amount of rupees one lac and that the imprisonment awarded in default of payment of fine is too harsh, being two years rigorous imprisonment. We do feel that the sentence awarded in default of payment of fine is too harsh and that it should not have been more than six months rigorous imprisonment.

18. In view of the above stated position, while upholding the conviction and sentence of substantive imprisonment of ten years rigorous imprisonment and fine of rupees one lac, we reduce the sentence awarded in default of payment of fine to six months rigorous imprisonment. Except for this change in the duration of imprisonment on account of default in payment of fine, the appeal is dismissed.

(Surjit Singh)
Judge

March 7, 2007 (BC)

(Dev Darshan Sud)
Judge